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Public Prosecutor v Kok Wah Kuan

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–46 OF 2007(W)

B

AHMAD FAIRUZ CHIEF JUSTICE, ABDUL HAMID MOHAMAD PCA, ALAUDDIN CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND ZAKI AZMI FCJ

23 OCTOBER 2007

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applies — Whether constitutional provision may be struck out on the ground that it contravenes the doctrine of separation of powers

Constitutional Law — Constitution — Federal Constitution — Doctrine of the

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Constitution provides — Whether courts to function only according to federal law if so provided by Constitution — Federal Constitution art 121(1)

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doctrine of separation of powers — Whether such sentence had the effect of consigning to the Executive the judicial power of the courts — Whether statutory provision prescribing such sentence unconstitutional — Federal Constitution art 121 — Child Act 2001 s 97(2)

The child respondent in this appeal was convicted in the High Court for murder punishable under s 302 of the Penal Code. He was ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s 97(2) of the Child Act 2001 (Act 611) ('the Child Act'). He appealed to the Court of Appeal which upheld the conviction but set aside the sentence imposed on him on the ground that s 97(2) of the Child Act was unconstitutional. The gist of the Court of Appeal's judgment was that as s 97(2) conferred power upon the Yang di-Pertuan Agong to determine sentence — such power exercisable by the Executive by virtue of art 39 of the Federal Constitution — s 97(2) of the Child Act contravened the doctrine of separation of powers embodied in the Federal Constitution by consigning to the Executive judicial power vested in the courts. The Deputy Public Prosecutor appealed to the Federal Court.

Held, by majority allowing the appeal:

(1) (per **Abdul Hamid Mohamad PCA**, delivering majority judgment) Prior to the amendment to art 121(1) of the Federal Constitution, there existed a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. The provision also then provided for the two High Courts to have jurisdiction and powers conferred by or under federal law. After the amendment (vide Act A704), there no longer exists a declaration that the 'judicial power of the Federation' — as the term was understood prior to the amendment — vests in the two High Courts. The jurisdiction and powers of the two High Courts are now prescribed by federal law and not dependent on the interpretation of the term 'judicial power' as prior the amendment. To say that the amendment had no effect did not make sense (see paras 9–11).

(2) (per **Abdul Hamid Mohamad PCA**, delivering majority judgment) In *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, s 418A of the Criminal Procedure Code was declared unconstitutional as it was held inconsistent with a specific provision of the Constitution — art 121(1) — that then provided inter alia that judicial power of the Federation shall be vested in two High Courts. The inconsistency then attracted art 4(1) of the Constitution which declared s 418A, to the extent of the inconsistency, void. *Dato' Yap Peng*'s case was not decided on the ground

that s 418A was inconsistent with the doctrine of separation of powers. In the instant appeal, the Court of Appeal's judgment did not show which provision of the Constitution s 97 was inconsistent with. Instead, the court held that that section (s 97) violated the doctrine of the separation of powers, which, in its view was an integral part of the Constitution (see paras 12–13).

(3) (per **Abdul Hamid Mohamad PCA**, delivering majority judgment) The Malaysian Constitution has features of the doctrine of the separation of powers and at the same time, contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though it influenced the framers of the Malaysian Constitution (see para 17).

(4) (per **Abdul Hamid Mohamad PCA**, delivering majority judgment) In determining the constitutionality or otherwise of a statute under the Federal Constitution by a court of law, it is the provision of the Constitution that matters, not a political theory by some thinkers (see para 18); *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) followed. The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, the Constitution provides that they 'shall have such jurisdiction and powers as may be conferred by or under federal law.' Therefore, reference must be made to the federal law to know the jurisdiction and powers of the High Courts (see para 21).

(5) (per **Abdul Hamid Mohamad PCA**, delivering majority judgment) Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law. It further provides that instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri, depending on where the offence was committed. That is the sentencing power given by federal law to the court as provided by the Constitution. Similarly, in some cases, federal law provides for the death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. The Legislature provides the sentences and the court imposes it where appropriate (see para 22).

(6) (per **Abdul Hamid Mohamad PCA**, delivering majority judgment) The doctrine of separation of powers is not definite and absolute.

The extent of its application varies from country to country, depending on how much it is accepted and in what manner it is provided for by the Constitution of a country. Similarly, judgments from other jurisdictions, while they are useful comparisons, should not be treated as if they are binding on the Malaysian courts (see para 27).

(7) (per **Abdul Hamid Mohamad PCA**, observation/obiter) The Prison Act empowers the Director General of Prisons to cancel and restore the remission of sentences upon a prisoner, which may be argued to amount to meddling with the fixed term of imprisonment passed by the court. Following the argument of the Court of Appeal, this should be unconstitutional too (see para 25).

(8) (per **Abdul Hamid Mohamad PCA**, observation/obiter) It is common for a statute to empower a Minister — a member of the Executive — to make rules or regulations — which are within the realm of the Legislature. Yet, there appears to be no provision in the Constitution empowering the Legislature to enact laws to give the power to make such by-laws to the Executive. Therefore, are the provisions in the statutes empowering Ministers to make by-laws unconstitutional on the ground that they contravene the doctrine of separation of powers? Applying the doctrine as a provision of the Constitution would therefore result in absurdity (see para 26).

(9) (per **Richard Malanjum CJ (Sabah and Sarawak)** concurring with the majority on the issue of the constitutionality of s 97 of the Child Act 2001) On a plain reading of sub-s (2) of s 97 it is clear that it empowers the court, after convicting a person who was a child at the time of commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. This alternative power to make such an order as provided for by the subsection is no less than the power of the court to impose a sentence or punishment on a child convict albeit in a different form, namely, to the care of the Yang di-Pertuan Agong or to the Ruler or to the Yang di-Pertua Negeri depending on where the offence was committed (see para 33).

(10)(per **Richard Malanjum CJ (Sabah and Sarawak)** concurring with the majority on the issue of the constitutionality of s 97 of the Child Act 2001) There is nothing unconstitutional in the scheme (of s 97) since it is still the court that makes the order consequential to its conviction order. When the court makes the order it is carrying out the process of sentencing which is generally understood to mean a process whereby punishment in accordance with established judicial principles is meted out by the court after a conviction order has been made following a full trial or a guilty plea. If the subsection left it entirely to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri, as the case may be to deal with a child convict after being convicted by the court,

there might be a different conclusion (see paras 34–35); *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315 and *Standard Chartered Bank & Ors v Directorate of Enforcement & Ors* AIR 2005 SC 2622 referred.

(11)(per **Richard Malanjum CJ (Sabah and Sarawak)** dissenting with regard to the view that the High Court's powers and jurisdiction are solely prescribed by federal law) Accepting the proposition that with the amendment to art 121(1) of the Federal Constitution the courts in Malaysia can only function in accordance with what has been assigned to them by federal laws, would be contrary to the democratic system of government wherein the courts form the third branch of the government and function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law (see para 37).

(12)(per **Richard Malanjum CJ (Sabah and Sarawak)** dissenting with regard to the view that the High Court's powers and jurisdiction are solely prescribed by federal law) The amendment to art 121(1) should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of the Federal Constitution. The amendment did not cause the courts to become servile agents of a Federal Act of Parliament and to only perform mechanically any command or bidding of a federal law (see para 38).

(13)(per **Richard Malanjum CJ (Sabah and Sarawak)** dissenting with regard to the view that the High Court's powers and jurisdiction are solely prescribed by federal law) The courts, especially the superior courts, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country for the following reasons: (i) the amendment to art 121(1) seeks to limit the jurisdiction and powers of the High Courts and inferior courts to whatever 'may be conferred by or under federal law'; (ii) the courts cannot be confined to 'federal law' as their role is to be servants of the law as a whole; (iii) it is not legally possible in a country with a supreme Constitution and with provision for judicial review to prevent the courts from examining constitutional questions; (iv) despite the amendment (to art 121(1)), the common law powers of the courts are intact (see *Ngan Tuck Seng v Ngan Yin Hoi* [1999] 5 MLJ 509 referred). Further, the inherent powers of the courts are a separate and distinct source of jurisdiction; (v) the courts cannot be prevented from interpreting the law creatively; (vi) past or earlier statutes have to be applied to modern or current

circumstances; (vii) in interpreting constitutional provisions, a judge cannot afford to be too literal. He is to be creative and not passive to enable the constitutional provisions to be the guardian of people's rights and the source of their freedom; (viii) the role of a judge is not just to deliver what is already there but it is also constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law, extending to direct or indirect law-making in the several ways mentioned in the judgment (see para 39).

[Bahasa Malaysia summary

Kanak-kanak responden dalam rayuan ini telah disabitkan di Mahkamah TInggi kerana membunuh yang boleh dihukum di bawah s 302 Kanun Keseksaan. Beliau telah diperintahkan untuk ditahan di atas perkenan Yang di-Pertuan Agong menurut s 97(2) Akta Kanak-Kanak 2001 (Akta 611) ('Akta Kanak-Kanak'). Beliau telah merayu ke Mahkamah Rayuan yang mengekalkan sabitan tersebut tetapi mengenepikan hukuman yang dikenakan ke atasnya atas alasan bahawa s 97(2) Akta Kanak-Kanak tidak berperlembagaan. Inti pati penghakiman Mahkamah Rayuan adalah bahawa s 97(2) memberikan kuasa ke atas Yang di-Pertuan Agong untuk menentukan hukuman — kuasa sebegini boleh digunakan oleh badan Eksekutif menurut perkara 39 Perlembagaan Persekutuan — s 97(2) Akta Kanak-Kanak melanggar doktrin pengasingan kuasa yang termaktub dalam Perlembagaan Persekutuan dengan mengkonsainkan kuasa kehakiman Eksekutif yang diberikan kepada mahkamah-mahkamah tersebut. Timbalan Pendakwa Raya merayu kepada Mahkamah Persekutuan.

Diputuskan, secara majoriti membenarkan rayuan tersebut:

(1) (oleh **Abdul Hamid Mohamad PMR**, menyampaikan penghakiman majoriti) Sebelum pindaan kepada perkara 121(1) Perlembagaan Persekutuan, terdapat deklarasi yang telah ditentukan bahawa kuasa kehakiman Persekutuan hendaklah diberikan kepada dua Mahkamah Tinggi. Peruntukan tersebut juga memperuntukkan agar dua Mahkamah Tinggi tersebut mempunyai bidang kuasa dan kuasa-kuasa yang diberikan oleh atau undang-undang persekutuan. Selepas pindaan (melalui Akta A704), tiada lagi wujud deklarasi bahawa 'judicial poer of the Federation' — kerana terma tersebut difahami sebelum pindaan — diberikan kepada dua Mahkamah Tinggi. Bidang kuasa dan kuasa-kuasa dua Mahkamah Tinggi tersebut sekarang ditetapkan oleh undang-undang persekutuan dan tidak bergantung kepada pentafsiran terma 'judicial power' seperti sebelum pindaan. Untuk mengatakan bahawa pindaan tersebut tiada kesan tidak diterima akal (lihat perenggan 9–11).

(2) (oleh **Abdul Hamid Mohamad PMR**, menyampaikan penghakiman majoriti) Dalam *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, s 418A Kanun Acara Jenayah diisytiharkan tidak berperlembagaan kerana ia diputuskan tidak konsisten dengan peruntukan spesifik Perlembagaan — perkara 121(1) — yang pada masa itu memperuntukkan antara lain bahawa kuasa kehakiman Persekutuan hendaklah diberikan kepada dua Mahkamah Tinggi. Ketidak konsistenan tersebut kemudiannya menarik perkara 4(1) Perlembagaan yang mengisytiharkan s 418A, setakat ketidak konsistenan tersebut, terbatal. Kes *Dato' Yap Peng* tidak diputuskan atas alasan bahawa s 418A tidak konsisten dengan doktrin pengasingan kuasa. Dalam rayuan semasa, penghakiman Mahkamah Rayuan tidak menunjukkan peruntukan mana dalam Perlembagaan yang mana s 97 adalah tidak konsisten dengan. Sebaliknya, mahkamah memutuskan bahawa seksyen tersebut (s 97) telah melanggar doktrin pengasingan kuasa, yang, pada pendapatnya merupakan bahagian yang melengkapkan bahagian-bahagian lain Perlembagaan (lihat perenggan 12–13).

(3) (oleh **Abdul Hamid Mohamad PMR**, menyampaikan penghakiman majoriti) Perlembagaan Malaysia mempunyai ciri-ciri doktrin pengasingan kuasa dan pada masa yang sama, mengandungi ciri-ciri yang tidak mematuhi doktrin tersebut dengan sebenarnya. Setakat mana doktrin tersebut terpakai bergantung kepada peruntukan-peruntukan Perlembagaan. Suatu peruntukan Perlembagaan tidak boleh dibatalkan atas alasan bahawa ia melanggar doktrin tersebut. Begitu juga tiada peruntukan undang-undang yang boleh dibatalkan sebagai tidak berperlembagaan jika ia tidak konsisten dengan Perlembagaan, meskipun ia mungkin tidak konsisten dengan doktrin tersebut. Doktrin tersebut bukan satu peruntukan Perlembagaan Malaysia meskipun ia mempengaruhi penggubal Perlembagaan Persekutuan (lihat perenggan 17).

(4) (oleh **Abdul Hamid Mohamad PMR**, menyampaikan penghakiman majoriti) Dalam menentukan keperlembagaan atau sebaliknya suatu statut di bahawa Perlembagaan Persekutuan oleh suatu mahkamah undang-undang, ia adalah peruntukan Perlembagaan yang penting, bukan teori politik oleh beberapa pemikir (lihat perenggan 18); *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 diikut. Takat kuasa-kuasa mahkamah bergantung kepada apa yang diperuntukkan dalam Perlembagaan. Dalam kes dua Mahkamah Tinggi tersebut, Perlembagaan memperuntukkan bahawa ia 'shall have such jurisdiction and powers as may be conferred by or under federal law.' Oleh itu rujukan hendaklah dibuat kepada undang-undang persekutuan untuk mengetahui bidang kuasa dan kuasa-kuasa Mahkamah Tinggi (lihat perenggan 21).

(5) (oleh **Abdul Hamid Mohamad PMR**, menyampaikan penghakiman majoriti) Undang-undang persekutuan memperuntukkan bahawa hukuman mati tidak sepatutnya diisytiharkan atau direkodkan terhadap seseorang yang pada masa kesalahan dilakukan adalah seorang kanak-kanak. Itu adalah had kuasa kehakiman mahkamah yang dikenakan oleh undang-undang. Ia seterusnya memperuntukkan bahawa sebaliknya, kanak-kanak tersebut hendaklah diperintahkan agar ditahan dalam penjara atas perkenan Yang di-Pertuan Agong atau Pemerintah atau Yang di-Pertua Negeri, bergantung kepada di mana kesalahan tersebut dilakukan. Itulah kuasa penghukuman yang diberikan oleh undang-undang persekutuan kepada mahkamah seperti yang diperuntukkan oleh Perlembagaan. Bahkan, dalam beberapa kes, undang-undang persekutuan memperuntukkan untuk hukuman mati, dan selainnya, pemenjaraan dan/atau denda, ada yang mandatori dan menurut budi bicara. Badan Perundangan memperuntukkan untuk hukuman-hukuman tersebut dan mahkamah mengenakannya di mana bersesuaian (lihat perenggan 22).

(6) (oleh **Abdul Hamid Mohamad PMR**, menyampaikan penghakiman majoriti) Doktrin pengasingan kuasa tidak tetap atau mutlak. Takat pemakaiannya berbeza dari satu negara ke satu negara lain, bergantung bagaimana ia diterima dan dalam cara apa ia diperuntukkan oleh Perlembagaan suatu negara itu. Begitu juga dengan penghakiman daripada bidang kuasa lain, meskipun ianya merupakan perbandingan yang berguna, ia tidak sepatutnya dianggap sebagai mengikat ke atas mahkamah-mahkamah Malaysia (lihat perenggan 27).

(7) (oleh **Abdul Hamid Mohamad PMR**, pemerhatian/obiter) Akta Penjara memberi kuasa kepada Ketua Pengarah Penjara membatal dan mengenakan semula pengampunan hukuman-hukuman ke atas seorang banduan, yang boleh dihujahkan membentuk campur tangan dengan tempoh tetap pemenjaraan yang telah dijatuhkan oleh mahkamah. Berikutan hujah Mahkamah Rayuan, ini sepatutnya tidak berperlembagaan juga (lihat perenggan 25).

(8) (oleh **Abdul Hamid Mohamad PMR**, pemerhatian/obiter) Adalah biasa untuk suatu statut itu memberikan seorang Menteri — ahli badan Eksekutif — membuat rukun atau peraturan — yang dalam skop badan Perundangan. Malah, tiada peruntukan dalam Perlembagaan yang memberikan badan Perundangan kuasa menggubal undang-undang untuk memberikan kuasa membuat undang-undang kecil kepada badan Eksekutif. Oleh itu, adakah peruntukan dalam statut-statut memberi kuasa kepada Menteri-Menteri membuat undang-undang kecil atas alasan bahawa ianya melanggar doktrin pengasingan kuasa? Dengan menggunakan doktrin tersebut sebagai satu peruntukan Perlembagaan adalah tidak munasabah (lihat perenggan 26).

(9) (oleh **Richard Malanjum HB (Sabah and Sarawak)** bersetuju dengan majoriti berhubung isu perlembagaan s 97 Akta Kanak-Kanak 2001) Dengan membaca sub-s (2) kepada s 97 adalah jelas bahawa ia memberi kuasa kepada mahkamah, selepas mensabitkan seseorang yang merupakan kanak-kanak pada masa kesalahan dilakukan boleh dijatuhkan hukuman mati, untuk membuat perintah alternatif daripada mengenakan hukuman mati. Kuasa alternatif untuk membuat perintah sebegini seperti diperuntukkan oleh subsesyen tersebut tidak kurangnya daripada kuasa mahkamah mengenakan hukuman ke atas kanak-kanak yang disabitkan di mana kesalahan telah dilakukan (lihat perenggan 33).

(10)(oleh **Richard Malanjum HB (Sabah and Sarawak)** bersetuju dengan majoriti berhubung isu perlembagaan s 97 Akta Kanak-Kanak 2001) Tiada apa-apa yang tidak berperlembagaan dalam skop tersebut (s 97) memandangkan mahkamahlah yang masih membuat perintah berikutan perintah sabitannya. Apabila mahkamah membuat perintah ia melaksanakan proses penghukuman yang biasanya difahami untuk bermaksud satu proses di mana hukuman bersesuaian dengan prinsip-prinsip kehakiman yang ditetapkan telah diputuskan oleh mahkamah selepas satu perintah sabitan dibuat berikutan satu perbicaraan penuh atau pengakuan bersalah. Jika subseksyen itu terpulang kepada Yang di-Pertuan Agong atau Pemerintah atau Yang di-Pertua Negeri, seperti dalam kes mengendalikan kanak-kanak yang disabitkan oleh mahkamah, mungkin terdapat keputusan berbeza (lihat perenggan 34–35); *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315 dan *Standard Chartered Bank & Ors v Directorate of Enforcement & Ors* AIR 2005 SC 2622 dirujuk.

(11)(oleh **Richard Malanjum HB (Sabah and Sarawak)** menentang berhubung pendapat bahawa kuasa dan bidang kuasa Mahkamah Tinggi semata-mata ditetapkan oleh undang-undang persekutuan) Dengan menerima kenyataan bahawa dengan pindaan kepada kuasa dan bidang kuasa perkara 121(1) Perlembagaan Persekutuan mahkamah di Malaysia hanya boleh berfungsi bersesuaian dengan apa yang dipertanggungjawabkan kepadanya oleh mahkamah persekutuan, adalah bertentangan dengan sistem demokratik kerajaan di mana mahkamah membentuk cabang ketiga kerajaan dan berfungsi untuk memastikan bahawa terdapat 'check and balance' dalam sistem termasuklah tanggungjawab penting melaksanakan keadilan menurut undang-undang (lihat perenggan 37).

(12)(oleh **Richard Malanjum HB (Sabah and Sarawak)** menentang berhubung pendapat bahawa kuasa dan bidang kuasa Mahkamah Tinggi semata-mata ditetapkan oleh undang-undang persekutuan) Pindaan kepada perkara 121(1) tidak sepatutnya dibaca untuk

bermaksud bahawa doktrin pengasingan kuasa dan kebebasan badan Kehakiman kini tidak lebih daripada ciri-ciri asas Perlembagaan Persekutuan. Pindaan tersebut tidak menyebabkan mahkamah menjadi ejen untuk suatu Akta Persekutuan kepada Parlimen dan untuk melaksanakan apa-apa arahan secara mekanik atau bidaan suatu undang-undang persekutuan (lihat perenggan 38).

(13)(oleh **Richard Malanjum HB (Sabah and Sarawak)** menentang berhubung pendapat bahawa kuasa dan bidang kuasa Mahkamah Tinggi semata-mata ditetapkan oleh undang-undang persekutuan) Mahkamah-mahkamah, terutamanya mahkamah atasan, adalah asing dan bebas daripada Perlembagaan Persekutuan dan bukan hanya ejen badan Perundangan Persekutuan. Dalam melaksanakan fungsinya, ia memainkan pelbagai peranan dan mentafsir dan menguatkuasakan pelbagai undang-undang. Perkara 121(1) bukan, dan tidak boleh, menjadi keseluruhan dan satu-satunya wadah untuk peranan kehakiman dalam negara ini berdasarkan sebab-sebab berikut: (i) pindaan kepada perkara 121(1) memohon dihadkan bidang kuasa dan kuasa Mahkamah Tinggi dan mahkamah bawahan terhadap apa-apa yang 'may be conferred by or under federal law'; (ii) mahkamah tidak boleh dihadkan kepada 'federal law' kerana peranannya adalah sebagai ejen undang-undang secara keseluruhannya; (iii) ia tidak mungkin secara sahnya dalam sebuah negara dengan Perlembagaan tertinggi dan dengan peruntukan untuk semakan kehakiman menghalang mahkamah-mahkamah tersebut daripada meneliti persoalan tentang perlembagaan; (iv) meskipun terdapat pindaan tersebut (kepada perkara 121(1)), kuasa-kuasa mahkamah common law masih kekal (lihat *Ngan Tuck Seng v Ngan Yin Hoi* [1999] 5 MLJ 509 dirujuk). Bahkan, kuasa sedia ada mahkamah adalah sumber bidang kuasa yang berasingan dan berbeza; (v) mahkamah-mahkamah tidak boleh disekat daripada mentafsirkan undang-undang secara kreatif; (vi) statut-statut terdahulu atau terawal telah digunakan dalam keadaan moden atau semasa; (vii) dalam mentafsirkan peruntukan-peruntukan perlembagaan, hakim tidak boleh bertindak terlalu liberal. Beliau hendaklah bersikap kreatif dan bukan pasif agar peruntukan-peruntukan perlembagaan dapat dijadikan pelindung hak-hak manusia dan sumber kebebasan mereka; (viii) peranan hakim bukan sahaja untuk menyampaikan apa yang telahpun sedia ada tetapi juga bersikap berperlembagaan dan kreatif dan melampaui pentafsiran mekanikal undang-undang sedia ada, yang melangkau membuat undang-undang secara langsung dan tidak langsung dalam beberapa cara yang dinyatakan dalam penghakiman (lihat perenggan 39).]

Notes

For a case on Federal Constitution, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1907.

For a case on validity of impugned legislation, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2207.
For cases on sentence for child offender generally, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para2184–4160.
For cases on constitutionality of statute, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2213–2214.
For cases on jurisdiction of High Court, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1927–1944.

Cases referred to

Chiu Wing Wa & Ors v Ong Beng Cheng [1994] 1 MLJ 89 (refd)
Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)
Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'Adzam Shah [1996] 1 MLJ 617 (refd)
Halimatussaadiah v Public Services Commission, Malaysia & Anor [1992] 1 MLJ 513 (refd)
Kesultanan Pahang v Sathask Realty Sdn Bhd (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (folld)
Mamat bin Daud & Ors v Government of Malaysia & Anor [1988] 1 MLJ 119 (refd)
Ngan Tuck Seng v Ngan Yin Hoi [1999] 5 MLJ 509 (refd)
Ooi Ah Phua v Officer-in-Charge of Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273 (refd)
R v Lord Chancellor, Ex p Witham [1998] QB 575 (refd)
R Rama Chandran v The Industrial Court [1997] 1 MLJ 145 (refd)
Standard Chartered Bank & Ors v Directorate of Enforcement & Ors AIR 2005 SC 2622 (refd)
Teoh Eng Huat v Kadhi, Pasir Mas & Anor [1990] 2 MLJ 300 (refd)

Legislation referred to

Child Act 2001 s 97(2)
Criminal Procedure Code ss 183, 418A
Federal Constitution arts 4(1), 5(1), (3), 11, 32(1), 39, 40, 41, 44, 45(1), 121(1)(b), 121(1B), (2), 128(1), 2), 160(2), 162(6)
Interpretation Act 1948/1967
Penal Code s 302
Prison Act 1995 ss 44, 50, 67
Prisons Regulations 2000 (PU(A) 325/2000)

Tan Sri Abdul Gani Patail (Datuk Yacub Sam with him) (Attorney General's Chambers) for the appellant.
Karpal Singh (Ram Karpal with him) (Karpal Singh & Co) for the respondent.

Abdul Hamid Mohamad PCA (now acting Chief Justice):

[1] The respondent who was 12 years and 9 months old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under s 302 of the Penal Code. He was convicted and ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s 97(2) of the Child Act 2001 (Act 611) ('the Child Act'). He appealed to the Court of Appeal. The Court of Appeal upheld the conviction but set aside the sentence imposed on him and released him from custody on the sole ground that s 97(2) of the Child Act was unconstitutional. The Public Prosecutor appealed to this court.

[2] On what ground did the Court of Appeal hold s 97(2) of the Child Act to be unconstitutional?

[3] From the judgment of the Court of Appeal, it can be seen that that court had arrived at that conclusion on the following premises:

(i) the doctrine of separation of powers is an integral part of the Constitution;

(ii) judicial power of the Federation vests in the courts;

(iii) by s 97(2) of the Child Act, Parliament had consigned the power to determine the measure of the sentence that was to be served to the Yang di-Pertuan Agong in the case of an offence committed in the Federal Territories, or to the Ruler or the Yang di-Pertua Negeri, if the offence is committed in the State.

(iv) by virtue of art 39 of the Federal Constitution (the Constitution'), the executive authority of the Federation vests in the Yang di-Pertuan Agong who, in accordance with art 40 of the Constitution, must act in accordance with the advice given by the Cabinet or particular minister of the Cabinet;

(v) therefore, s 97(2) of the Child Act contravenes the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine the measure of the sentence to be served by the appellant.

[4] Before going any further I will first reproduce the relevant provisions of the Constitution and the Child Act. Article 121 of the Constitution provides:

> 121(1) *There shall be* two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya... and;
>
> (b) one in the States of Sabah and Sarawak... and the High Courts … *shall have such jurisdiction and powers as may be conferred by or under federal law.*
>
> (Emphasis added.)

[5] Article 4(1) of the Constitution provides:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[6] Section 97 of the Child Act provides:

> (1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.
>
> (2) In lieu of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of —
>
> (a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or
>
> (b) (the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.
>
> (3) If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act –
>
> (a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and
>
> (b) while so detained, be deemed to be in lawful custody.
>
> (4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison –
>
> (a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release of further detention of that person,

and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.

[7] The Court of Appeal posed two questions for it to answer. They are, first, whether the doctrine of separation of powers is an integral part of the Constitution and, secondly, whether s 97 of the Child Act 'in pith and substance violates the doctrine'. The court, answered the two questions in the affirmative. On the first question, the court held that the amendment to art 121 of the Constitution by Act A704 did not have the effect of divesting the courts of the judicial power of the Federation. The court gave two reasons:

First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of government. Second, the marginal note to art 121 was not amended. This clearly expresses the intention of Parliament not to divest ordinary courts of judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature.

[8] Let us take a close look at the provision of art 121 of the Constitution before and after the amendment.

[9] Prior to the amendment, art 121(1) of the Constitution reads:

… the judicial power of the Federation shall be vested in the two High Courts … and the High Courts … shall have such jurisdiction and powers as may be conferred by or under federal law.

[10] There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'Was the judicial power of the Federation vested in the two High Courts?' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went of to say 'and the High Courts … shall have jurisdiction and powers as may be conferred by or under federal law.' In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.

[11] After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High

Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?

[12] In *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, s 418A of the Criminal Procedure Code came into question as it was argued that it infringed arts 121(1) and 5(1) of the Federal Constitution. Zakaria Yatim J (as he then was) held that s 418A of the Criminal Procedure was unconstitutional as it was inconsistent with art 121(1) of the Constitution. Appeal to the Supreme Court was dismissed by a majority of 3:2. That case was decided, not on the ground that it was inconsistent with the doctrine of separation of powers. It was decided on the ground that it was inconsistent with the term 'judicial power' of the court then provided by art 121(1) of the Constitution. In other words s 418A was inconsistent with the specific provision of the Constitution that provides '… the judicial power of the Federation shall be vested in two High Courts...' The inconsistency then attracts art 4(1) of the Constitution which declares such a law, to the extent of the inconsistency, be void.

[13] What about the instant appeal? In the instant appeal, even the Court of Appeal's judgment does not, indeed cannot, show which provision of the Constitution s 97 is inconsistent with. Instead the court held that that section violated the doctrine of the separation of powers, which, in its view was an integral part of the Constitution.

[14] What is this doctrine of separation of powers? Separation of powers is a term coined by French political enlightenment thinker Baron de Montesquieu. It is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent abuse of power. The principle traces its origins as far back as Aristotle's time. During the Age of Enlightenment, several philosophers, such as John Locke and James Harrington, advocated the principle in their writings, whereas others such as Thomas Hobbes strongly opposed it. Montesquieu was one of the foremost supporters of the doctrine. His writings considerably influenced the opinions of the framers of Constitution of the United States. There, it is widely known as 'checks and balances'. Under the Westminster System this separation does not fully exist. The three branches exist but Ministers, for

example, are both executives and legislators. Until recently, the Lord Chancellor was a member of all the three branches — see generally ECS Wade and AW Bradley: *Constitutional and Administrative Law* (10th Ed); Wikipedia (Encyclopedia).

[15] In P Ramanatha Aiyar's *Advance Law Lexicon* Vol 4, we find the following passage:

> It is extraordinarily difficult to define precisely each particular power." - GEORGE WHITECROSS PATON, A Textbook of Jurisprudence 330 (GW Paton & David P Derham eds (4th Ed, 1972).
>
> A political system that separates executive, legislative, and judicial powers of government into separate branches. Some systems combine two, or even all three, powers into single institutions. In the United States, many administrative agencies actually exercise at least first level judicial powers, and many administrative agencies also exercise what amount to legislative powers in promulgating detailed legal regulations: In other systems, the absence of a separation of powers, particularly between the executive and the legislative, is more explicit... as in the Westminster style parliamentary system.

[16] Malaysia, like the United States has a written Constitution that spells out the functions of the three branches. At the same time it follows the Westminster model and has its own peculiarities. The Yang di-Pertuan Agong is the Supreme Head of the Federation (art 32(1)). The executive authority of the Federation is vested in the Yang di-Pertuan Agong (art 39). He is the Supreme Commander of the armed forces of the Federation (art 41). Parliament consists of the Yang di-Pertuan Agong, the Dewan Negara and Dewan Rakyat (art 44). While members of the Dewan Rakyat are directly elected, members of the Dewan Negara may be elected by the Legislative Assembly of the States or appointed by the Yang di-Pertuan Agong (art 45(1) and Seventh Schedule). Judges, including the Chief Justice are appointed by the Yang di-Pertuan Agong. Even the principal registry of the High Court of Sabah and Sarawak is determined by the Yang di-Pertuan Agong (art 121(1)(b)). On top of all that, the Yang di-Pertuan Agong, unlike the British Monarch, is elected by the Conference of Rulers for a fixed period of five years. And so on.

[17] In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of

A the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void.

B

[18] So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah F.J. (as His Royal Highness then was) quoting Frankfurter J said

C in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.'

D **[19]** His Lordship further said at pp 188–189:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this
>
> E wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro v Atkintola & Anor*. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitution to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

F

[20] I agree entirely with those observations.

[21] Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute.

G The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law.' So, we will have to look at the federal law to know the jurisdiction and powers of the courts. (In the case of the Federal Court and the Court of Appeal, part of

H their jurisdiction is specifically provided in the Constitution itself — see art 121(1B) and (2) respectively).

[22] So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution

I provides, not what some political thinkers think 'judicial power' is. Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law. It further provides that, instead, the child shall be ordered to be detained in a prison

during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang Di-Pertua Negeri, depending on where the offence was committed. That is the sentencing power given by federal Law to the court as provided by the Constitution. Similarly, in some cases, federal law provides for death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. The Legislature provides the sentences, the court imposes it where appropriate.

[23] Going one step further, even where the court imposes a sentence of imprisonment for a fixed term of more than a month, a prisoner is entitled to be granted a remission of his sentence. The Director General of Prisons may cancel any part of the remission if the prisoner commits an offence under s 50 of the Act. He may restore to the prisoner all or any part of the remission which the prisoner has forfeited during his sentence — s 44 of the Prison Act 1995 (Act 537) ('the Prison Act').

[24] Section 67 of the Prison Act empowers the Minister to publish in the Gazette such regulations, inter alia, providing for the remission of sentences to be allowed to a prisoner. Hence Prisons Regulations 2000 (PU(A) 325/2000) is made.

[25] We see here that the Prison Act empowers the Director General of Prisons to cancel and restore the remission which may be argued to amount to meddling with the fixed term of imprisonment passed by the court. Following the argument of the Court of Appeal, this should be unconstitutional too.

[26] Let us take another example. It is common for a statute to make provision for a Minister in charge of an Act of Parliament to make rules or regulations. The Minister is an Executive. Rules and Regulations and by-laws, having the effects of law, is within the realm of the Legislature to make, not the Executive. Yet, I am unable to find any provision in the Constitution giving power to the Legislature to make law to give the power to make such by-laws to the Executive. So, are the provisions in the Statutes giving Ministers power to make by-laws unconstitutional too on the ground that they contravene the doctrine of separation of powers? All these show the absurdity of applying the doctrine as a provision of the Constitution.

[27] All these examples show that the doctrine is not definite and absolute. The extent of its application varies from country to country, depending on how much it is accepted and in what manner it is provided for by the Constitution of a country. Similarly, judgments from other jurisdictions, while they are useful comparisons, should not be treated as if they are binding

on our courts. As such, I do not think it is necessary to discuss all those cases from other jurisdictions referred to us.

[28] On these grounds I would allow the appeal, set aside the order of the Court of Appeal and reinstate the order of the High Court.

[29] Ahmad Fairuz Chief Justice, Alauddin CJ (Malaya) and Zaki Azmi FCJ have read this judgment and agreed with it.

Richard Malanjum CJ (Sabah and Sarawak):

[30] This is an appeal by the Public Prosecutor against the decision of the Court of Appeal which upheld the conviction of the respondent but set aside the sentence imposed and released him from custody on the ground that s 97(2) of the Child Act 2001 (Act 611) was unconstitutional.

[31] I need not summarize the reasons given by the Court of Appeal since it has already been admirably done in the judgment of the learned President of the Court of Appeal.

[32] Section 97 of the Child Act reads:

(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.

(2) In lieu of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of—

(a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or

(b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

(3) If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act —

(a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and

(b) while so detained, be deemed to be in lawful custody.

(4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison —

(a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person, and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.

[33] On plain reading of sub-s (2) of s 97 it is clear that it empowers the court, after convicting a person who was a child at the time of commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. In my view the alternative power to make such an order as provided for by the subsection is no less than the power of the court to impose a sentence or punishment on a child convict albeit in a different form, namely, to the care of the Yang di-Pertuan Agong or to the Ruler or to the Yang di-Pertua Negeri depending on where the offence was committed.

[34] Hence, with respect I do not think there is anything unconstitutional in the scheme since it is still the court that makes the order consequential to its conviction order. In my view when the court makes the order it is carrying out the process of sentencing which is generally understood to mean a process whereby punishment in accordance with established judicial principles is meted out by the court after a conviction order has been made following a full trial or a guilty plea (see *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315; *Standard Chartered Bank & Ors v Directorate of Enforcement & Ors* AIR 2005 SC 2622). Incidentally s 183 of the Criminal Procedure Code provides: 'If the accused *is convicted, the court shall pass sentence according to law*'.

[35] It might have been a different conclusion if the subsection leaves it entirely to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri as the case may be to deal with a child convict after being convicted by the court.

[36] For the above reason I do not think it is thus necessary for me to deal with those constitutional points highlighted by the Court of Appeal in coming to its decision.

[37] At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been

assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

[38] The amendment which states that '*the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

[39] It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country for the following reasons:

(i) The amendment seeks to limit the jurisdiction and powers of the High Courts and inferior courts to whatever "*may be conferred by or under federal law*". The words "*federal law*" are defined in Article 160(2) as follows:

> *Federal law means —*
>
> (a) *any existing law relating to a matter with respect to which Parliament has power to make law, being a law continued in operation under Part XIII; and*
>
> (b) *any Act of Parliament*;

(ii) The courts cannot obviously be confined to '*federal law*'. Their role is to be servants of the law as a whole. Law as a whole in this country is defined in art 160(2) to include '*written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof*'. Further, '*written law*' is defined in art 160(2) to include '*this Constitution and the Constitution of any State*'. It is obvious, therefore, despite the amendment, the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal

Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law.

(iii) Moreover, the Federal Constitution is superior to federal law. The amendment cannot be said to have taken away the powers of the courts to examine issues of constitutionality. In my view it is not legally possible in a country with a supreme Constitution and with provision for judicial review to prevent the courts from examining constitutional questions. Along with arts 4(1), 162(6), 128(1) and 128(2), there is the judicial oath in the Sixth Schedule '*to preserve, protect and defend (the) Constitution*'.

(iv) With respect I do not think the amendment should be read to destroy the courts' common law powers. In art 160(2) the term '*law*' includes '*common law*'. This means that, despite the amendment, the common law powers of the courts are intact (see *Ngan Tuck Seng v Ngan Yin Hoi* [1999] 5 MLJ 509). The inherent powers are a separate and distinct source of jurisdiction. They are independent of any enabling statute passed by the Legislature. On Malaysia Day when the High courts came into existence by virtue of art 121, '*they came invested with a reserve fund of powers necessary to fulfill their function as superior courts of Malaysia*'. Similar sentiments were expressed in *R Rama Chandran v The Industrial Court* [1997] 1 MLJ 145.

(v) The amendment in my view cannot prevent the courts from interpreting the law creatively. It is now universally recognized that the role of a judge is not simply to discover what is already existing. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond formal rules to seek a solution to the problem at hand. In a novel situation a judge has to reach out where the light of '*judicial precedent fades and flicker and extract from there some raw materials with which to fashion a signpost to guide the law*'. When rules run out, as they often do, a judge has to rely on principles, doctrines and standards to assist in the decision. When the declared law leads to unjust result or raises issues of public policy or public interest, judges would try to find ways of adding moral colours or public policy so as to complete the picture and do what is just in the circumstances.

(vi) Statutes enacted in one age have to be applied in a time frame of problems of another age. A present time-frame interpretation to a past time framed statute invariably involves a judge having to consider the circumstances of the past to the present. He has to

cause the statute to 'leapfrog' decades or centuries in order to apply it to the necessities of the times.

(vii) Further, in interpreting constitutional provisions, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallize what is inherent. His task is creative and not passive. This is necessary to enable the constitutional provisions to be the guardian of people's rights and the source of their freedom (see *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; *Mamat bin Daud & Ors v Government of Malaysia & Anor* [1988] 1 MLJ 119).

(viii) Though there is much truth in the traditionalist assertion that the primary function of the courts is to faithfully interpret and apply laws framed by the elected Legislatures, there are, nevertheless, a host of circumstances in which the role of a judge is not just to deliver what is already there. The role is constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law. It extends to direct or indirect law making in the following ways:

(1) Formulating original precedents

Life is larger than the law and there is no dearth of novel situations for which there is no enacted rule on point. In such situations a judge relies on the customs and traditions of the land and on standards, doctrines and principles of justice that are embedded in the life of the community to lay down an 'original precedent' to assist the court. Admittedly, this fashioning of a new precedent is an infrequent occurrence but its impact on legal growth is considerable;

(2) Overruling earlier precedents

Judicial creativity is fully in play when a previous precedent is overruled and thereby denied the authority of law. The overruling may be retrospective or prospective. In either case a new principle is contributed to the legal system and a new direction is forged;

(3) Constitutional review

Under arts 4(1) and 128 of the Federal Constitution, the superior courts of this country have the power to review the validity of legislative and executive actions by reference to norms of the basic law. If a legislative measure is found by the court to be unconstitutional, the court has a number of choices. It may condemn the entire statute as illegal or it may apply the doctrine of severability and invalidate only the

sections that are unconstitutional and leave the rest of the statute intact. The court may declare the statute null and void ab initio or only from the date of the ruling. For instance in *Public Prosecutor v Dato Yap Peng* [1987] 2 MLJ 311 the Supreme Court invalidated s 418A of the Criminal Procedure Code prospectively.

Questions of constitutionality are fraught with political and policy considerations and decisions thereon can influence the course of legal and political development. For example in *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'Adzam Shah* [1996] 1 MLJ 617 the majority held that the 1993 constitutional amendment removing the immunities of the Sultans cannot apply to suits brought by foreigners.

Article 162(6) of the Federal Constitution allows judges to modify pre-Merdeka laws in order to make such laws conform to the Constitution. Modification is without doubt a legislative task.

(4) Statutory interpretation

In interpreting pre-existing law a judge is not performing a mere robotic function. The interpretive task is, by its very nature, so creative that it is indistinguishable from law-making. '*The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*' (per the American jurist Oliver Wendell Holmes). This is specially so in constitutional law. Even if it is accepted that a judge is bound by the intention of the Legislature, it must be noted that such an intention is not always clearly defined. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond the statute to seek a solution to the problem at hand (see *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89). A judge may scrutinise preambles, headings and extraneous materials like explanatory statements that accompany Bills and parliamentary debates to help unravel the meaning of statutory formulae. A judge may lean on the interpretation clauses of a statute or on the Interpretation Act 1948/1967 to decipher the intention of the Legislature. Or he may fall back on a wealth of rules of statutory construction to aid his task. So numerous and varied are these rules that judicial discretion to rely on one rule or another cannot be predicted. Sometimes a judge's attention is drawn to foreign legislation and related precedents. He may declare the overseas statute to be in *pari materia* with local legislation and, therefore, relevant to the case. Alternatively, he may pronounce

A the local law to be *sui generis* and therefore to be viewed in the local context without aid of foreign decisions.

When the enacted law leads to undesirable or unjust results, a judge may be persuaded to add moral or public policy shades to the issue in order to do justice.

B One could also note, for instance, the '*public interest*' interpretation of art 5(3) of the Federal Constitution in *Ooi Ah Phua v Officer-in-Charge of Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 in which the court held that the constitutional right to legal representation can be postponed pending police investigation. In *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 the 'wider interest of the nation' prevailed over a minor's right to religion guaranteed by art 11. In *Halimatussaadiah v Public Services Commission, Malaysia & Anor* [1992] 1 MLJ 513 the court subjected a public servant's claim of a religious right to wear purdah at the workplace to the need to maintain '*discipline in the service*'.

A judge is not required to view a statute in isolation. He is free to view the entire spectrum of the law in its entirety; to read one statute in the light of related statutes and relevant precedents; to understand law in the background of a wealth of presumptions, principles, doctrines and standards that operate in a democratic society (see *Kesultanan Pahang v Sathask Realty Sdn Bhd*; [1998] 2 MLJ 513). He is justified in giving effect to what is implicit in the legal system and to crystallize what is inherent. Such a holistic approach to legal practice is justified because 'law' in art 160(2) is defined broadly to include written law, common law and custom and usage having the force of law.

G (5) Operation of doctrine of binding precedent

The doctrine of binding judicial precedent exists to promote the principle of justice that like cases should be decided alike. It also seeks to ensure certainty, stability and predictability in the judicial process. There can be no denying that the existence H of this doctrine imposes some rigidity in the law and limits judicial choices. But one must not ignore the fact that some flexibility and maneuverability still exist.

Though a superior court is generally reluctant to disregard its own precedents, it does have the power '*to refuse to follow*' its I earlier decisions or to cite them with disapproval. Our Federal Court has, on some occasions, overruled itself. High Court judges occasionally refuse to follow other High Court decisions. An inferior court can maneuver around a binding decision through a host of indirect techniques.

(6) Application of doctrine of ultra vires

Whether an agency has acted ultra vires is a complex question of law that permits judicial creativity.

Some statutes declare that discretion is absolute or that a decision is final and conclusive. Some statutory powers are conferred in broad and subjective terms. To statutory formulae of this sort, contrasting judicial responses are possible. The court may interpret them literally and give judicial sanction to absolute powers.

Alternatively the court may read into the enabling law implied limits and constitutional presumptions of a rule of law society. This will restrict the scope of otherwise unlimited powers (see *R v Lord Chancellor, Ex p Witham* [1998] QB 575). Subjective powers may be viewed objectively. Purposive interpretation may be preferred over literal interpretation (see *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273).

When procedural violations are alleged, a decisive but discretionary issue is whether the procedure was mandatory or directory. Violation of a mandatory procedure results in nullity. Violation of a directory requirement is curable.

(7) Import of rules of natural justice

Rules of natural justice are non-statutory standards of procedural fairness. They are not nicely cut up and dried and vary from situation to situation. Judges have wide discretion in determining when they apply and to what extent.

[40] Hence, it is reasonable to emphasize that the amendment should not be construed or viewed as having emasculated the courts in this country to mere automaton and servile agents of a federal Act of Parliament.

[41] Anyway, reverting to this appeal, for the reason I have given earlier on I would therefore allow it and restore the order made by the High Court.

Appeal allowed by majority.

Reported by Andrew Christopher Simon